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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

This case presents for adjudication significant questions, never previously decided by this Court, relating to the reconciliation of the conflict between federal labor and shipping regimes—questions which Justice Marshall observed in an earlier companion case "present difficult and complex problems." *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 512 (1980). These questions are:

1. Whether national labor and shipping policies require that a collectively bargained work preservation provision in the maritime industry, which is governed by the specific prescriptions of federal labor law, should be accorded a labor exemption from federal shipping law?

2. Whether the inherent effect upon third parties of every work preservation provision—a factor which this Court has consistently held may not be considered in adjudging its legality under federal labor law—should nevertheless cause an automatic forfeiture of the labor exemption from federal shipping law?

Parties

All parties in the court of appeals appear in the caption. In accordance with Rule 28.1 of the Rules of this Court, it should be noted that corporate petitioner New York Shipping Association, Inc. has one subsidiary, Atlantic Cargo Inspection Corporation. The other petitioner, Council of North Atlantic Shipping Associations, is an unincorporated association which has no corporate parent or subsidiaries.

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v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Council of North Atlantic Shipping Associations ("CONASA") and New York Shipping Association, Inc. ("NYSA") pray that a writ of certiorari issue to review the judgment entered in this case on March 2, 1982 by the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals is reported officially at 672 F.2d 171.[1] A copy is reproduced as Appendix A in the separately bound appendix to this petition (App. A at 1a-47a).[2] The decision of the Federal Maritime Commission (App. B at 48a-60a) appears officially at 21 F.M.C. 1 (1978).[3] The Federal Maritime Commission ("FMC" or "Commission") adopted the initial decision of its administrative law judge (App. C at 61a-120a) which appears at 21 F.M.C. 7 (1975).[4]

Jurisdiction

The judgment of the court of appeals (App. D at 121a-122a) was entered on March 2, 1982. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutes

The relevant statutes are Labor Management Relations Act ("LMRA") §§ 8(b)(4) and 8(e), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976); Shipping Act §§ 14 Fourth, 16 First, and 18(a), 46 U.S.C. §§ 812 Fourth, 815 First, and 817(a) (1976); Intercoastal Shipping Act § 4, 46 U.S.C. § 845(a) (1976); and the Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021 (Aug. 8,

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[1] It is also reported in 93 Lab. Cas (CCH) ¶ 13,286 and in 109 L.R.R.M. (BNA) 2896.

[2] References are to the pages of the separately bound appendix.

[3] It is also reported at 18 S.R.R. (P&F) 553 (FMC 1978).

[4] The initial decision is also reported at 16 S.R.R. (P&F) 315 (FMC 1975).

1980). The complete texts of these statutes are reproduced verbatim in the separately bound appendix (App. E at 123a-132a).

Statement of the Case

This case arises out of the implementation in 1973 of the Rules on Containers, the collectively bargained response to the technological displacement of longshore work occasioned by the increasing use of automated cargo handling techniques in the maritime industry. The relevant facts appear in the opinions of this Court and the District of Columbia Circuit in *NLRB* v. *International Longshoremen's Association ("ILA")*, 447 U.S. 490 (1980), *aff'g* 613 F.2d 890 (D.C. Cir. 1979). However, for the convenience of the Court, the more salient facts will be highlighted.

The Rules on Containers were forged during the turbulent history of a labor struggle that has raged in the shipping industry without interruption for the past 25 years (App. A at 1a-2a, 9a, 10a, 18a-19a; App. I at 188a-197a). Their emergence is a classic chronicle of a labor union's primal efforts to exact from its members' employers contractual protection for the job security of union members, who were faced with a drastic loss of work opportunities (App. A at 7a-8a; App. C at 82a; App. I at 184a-185a, 196a, 197a, 239a, 247a n.65). The focus of contention has been the industry's increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by radically decreasing the need for the traditional piece-by-piece loading and unloading of oceanborne cargo by longshoremen (App. A at 8a n.22; App. I at 202a). This technological advance, known as containerization, was conceived, nurtured and developed

by the shipping employers' investment of hundreds of millions of dollars (App. A at 4a; App. I at 190a, 224a).

From the advent of containerization in the late 1950's to the present, the longshoremen's union, the International Longshoremen's Association, AFL-CIO ("ILA"), and the shipping employers have disagreed about the use of containers (App. A at 9a-10a; App. C at 83a; App. I at 186a-187a). The employers through their collective bargaining representatives[5] have consistently taken the position that their containers should be permitted to move on and off the docks without restriction (App. A at 9a; App. C at 83a; App. I at 188a). Conversely, the ILA has strenuously resisted the use of containers (App. A at 9a; App. I at 188a-197a).[6]

After a decade of labor strife and a series of inadequate contractual solutions, the dispute reached a crucial juncture in the 1968 negotiations because of the introduction of the

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[5] Petitioners CONASA and NYSA are multi-employer associations in the longshore industry. CONASA represents constituent multi-employer associations in ports from Massachusetts to Virginia (App. A at 2a n.1; App. C at 80a). NYSA represents shipping employers in the Port of New York (App. A at 3a n.2). Since CONASA's formation in 1970, it has bargained with the ILA over certain key issues, including containerization, on a master contract basis (App. A at 9a n.25). Prior to the formation of CONASA, other ports on the Atlantic and Gulf coasts generally adopted the master terms of the labor agreement negotiated by NYSA in the Port of New York (App. A at 9a n.25). After NYSA's withdrawal from CONASA in 1977 both associations continued to participate jointly in master contract negotiations with the ILA.

[6] In 1964, the United States Department of Labor urged both management and labor to resolve their differences through collective bargaining. The Labor Department recommended that the parties be guided by the equitable principle that, while management may introduce new technology and improve manpower utilization, it has a concomitant obligation to assure a direct measure of job security for its work force.

first fully containerized vessel into the major North Atlantic trade (App. I at 247a n.64) and the published plans by many carrier employers to embark upon full container operations. The longshoremen's demand to load ("stuff") and unload ("strip") all containers was rejected (App. I at 190a). A strike then ensued for 57 days on the North Atlantic coast and for more than 100 days in other Atlantic and Gulf ports (App. A at 10a; App. I at 190a). The Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. § 171, *et seq.* (1976), identified containerization as the critical issue separating the parties (App. I at 191a).

Under unrelenting strike pressure, and with the assistance of a federal mediator appointed by the President of the United States, the carrier employers for their own survival and to maintain the flow of commerce reluctantly reached agreement with the ILA (App. A at 10a). The shipping industry recognized that the longshoremen had the right to demand and negotiate contract provisions preserving their work (App. A at 3a). Similarly, the dockworkers' union realized that it should not unreasonably impede technological progress, even though, as this Court has recognized, the union could have precluded all containerization. *ILA*, 447 U.S. at 510. The resulting collective bargaining agreement contained the Rules on Containers—essentially the same contractual provisions challenged in this case.[7]

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[7] Shortly after the Rules were formalized in the 1968 labor contract, their validity was upheld—first, under LMRA §§ 8(b)(4) and 8(e), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976), by a Regional Director and General Counsel of the National Labor Relations Board, and then under the antitrust laws by the United States Court of Appeals for the Second Circuit. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n ("ICTC")*, 426 F.2d 884 (2d Cir. 1970).

The Rules represented a compromise (App. A at 11a; App. C at 81a, 83a; App. I at 225a). The ILA permitted the overwhelming bulk, or more than 80% of the container traffic on the Atlantic and Gulf Coasts, consisting of full shipper's loads,[8] as well as all other containers which originate at or are destined to points 50 or more miles from a port, to pass over the piers intact (App. A at 11a; App. C at 81a; App. I at 192a, 225a). In exchange, the carrier employers agreed that any loading or unloading of their own containers with cargo from within the local 50 mile port area (other than FSL cargo) would continue to be performed by their own longshore employees at the piers (App. A at 11a-12a; App. C at 67a n.3; App. I at 177a-178a).[9] This basic compromise enabled containerization to flourish, producing a monumental increase in longshore work productivity (App. A at 5a n.11, 8a n.22).

Despite the contractual formality of the Rules,[10] the ILA continued to assert that the steamship carriers and other shipping employers were permitting, if not encouraging, violations of the labor contract, thus depriving longshoremen of their traditional work (App. A at 10a; App. I at

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[8] A full shipper's load ("FSL") is a full container load of goods beneficially owned by a single shipper or consignee which loads or unloads the container at its own place of business. *ILA*, 447 U.S. at 497.

[9] To induce on-pier performance of this work, the Rules provided that any export container loaded at a local off-pier facility within 50 miles of a port was to be stripped and its contents stuffed into a container at pierside (App. A at 11a; App. C at 67a). The converse applied to an import container; its contents would be stripped at the pier if it was to be unloaded at an off-pier facility within 50 miles (App. A at 11a). The traditional exemptions for mail, household goods and the personal effects of military personnel were retained (App. A at 12a).

[10] After another long strike of 56 days' duration, the 1971 labor contract, now negotiated by CONASA, left the 1968 Rules intact (App. I at 193a-194a).

194a). The ILA's principal complaint opposed the shipment of consolidated containers (loaded with the individual cargo lots of several shippers) since their contents had not been handled by longshoremen at the docks. Faced with the ILA strike threat to halt the movement of all containers if the Rules were not effectively enforced, the shipping employers in 1973 acceded to an amendment, known as the Dublin Supplement, which was designed to eliminate the violations cited by the ILA (App. A at 10a; App. C at 89a; App. I at 194a-195a).

The Dublin Supplement prohibited the steamship carrier employers from releasing their containers to off-pier consolidation facilities (App. A at 13a, 13a n.45; App. C at 89a; App. I at 195a).[11] The shipping employers were to advise the consolidation companies to deliver their loose cargo lots to the pier where they would be physically loaded in the first instance into the shipping employers' containers by their own longshore employees. Any import consolidated container was to be stripped at pierside and its contents picked up by the consolidator in uncontainerized form (App. C at 90a).

The basic principles in the 1968 and 1971 Rules and Dublin Supplement were retained in the 1974 Rules on Containers (App. I at 195a-196a). This litigation ensued when the Rules were embodied verbatim by a steamship carrier into its ocean tariff (App. A at 14a-15a). The FMC then initiated an investigation into the legality of the Rules under federal shipping law (App. A at 15a).[12]

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[11] Consolidation companies, or nonvessel operating common carriers, solicit shipments with volumes smaller than the capacity of a container from various shippers and arrange for its consolidation into containers (App. I at 218a-220a).

[12] The Rules have also been the subject of labor and antitrust litigation spanning the last decade. *See ILA*, 613 F.2d at 906-08.

(footnote continued on following page)

Decisions Below

The FMC[11]

The Commission refused to grant the nonstatutory labor exemption to the Rules on Containers (App. B at 54a-59a; App. C at 106a-118a; App. G at 145a-146a; App. H at 148a-149a). Its reasons for this denial are unclear. On the one hand, the Commission seemed to say that the labor exemption is available only to relieve labor contracts from the preimplementation approval requirements of Shipping Act § 15, 46 U.S.C. § 814 (Supp. IV 1980)—statutory procedures not involved in this case. This narrow view of the labor exemption rested upon the Commission's misreading (App. B at 57a-59a; App. C at 112a-113a) of this Court's earlier decisions in *Volkswagenwerk Aktiengesellschaft* v. *FMC ("Volkswagen")*, 390 U.S. 261 (1968) and *FMC* v. *Pacific Maritime Association ("PMA")*, 435 U.S. 40 (1978).

(footnote continued from preceding page)

Following this Court's remand in *ILA*, the National Labor Relations Board reconsidered all existing labor law litigation involving the Rules in a single consolidated proceeding. The Board is currently reviewing the recent initial decision of its Administrative Law Judge (App. I at 153a-367a) who, with certain limited exceptions not germane to this case, upheld the validity of the Rules on Containers under national labor law. *Int'l Longshoremen's Ass'n*, Nos. 2-CC-1364, *et al.* (NLRB Initial Decision Sept. 29, 1981). The related antitrust suits have been stayed awaiting the final outcome of this NLRB litigation. *See, e.g., Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied sub nom. In re Int'l Longshoremen's Ass'n*, 451 U.S. 905 (1981). Since February 24, 1981, implementation of the Rules on Containers has been enjoined under LMRA § 10(l), 29 U.S.C. § 160(l) (1976), pending the NLRB's final determination. *See Pascarell* v. *New York Shipping Ass'n*, No. 81-13 (D.N.J.), *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 102 S. Ct. 130 (1981).

[11] Since the Commission's final decision expressly adopted the initial decision of its administrative law judge, both decisions will be addressed interchangeably.

On the other hand, the Commission seemed to foreclose the labor exemption to any labor contract that did not comport with the substantive prescriptions of the shipping statutes (App. B at 54a-55a; App. C at 107a-108a). In the Commission's parochial view, the legality of the collective bargaining agreement under national labor law "matters not at all." (App. C at 107a). Under this test, the labor exemption becomes no more than an ephemeral and meaningless label completely lacking in substance. The Commission would require that a labor contract first pass muster under shipping law standards to establish its right of exemption from these very same provisions. In essence then, the Commission merged the issues of shipping law exemption and shipping law liability, the practical effect of which is the demise of the labor exemption.[14]

The Court of Appeals

The court of appeals sustained denial of the exemption for reasons not articulated in the FMC's tenebrious decision.[15] The court's principal basis for denial of the exemption was that "[t]he Rules on Containers, as incorporated into the . . . tariff, directly impose terms on third parties."

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[14] The questions of exemption and liability are separate and distinct issues. *PMA*, 435 U.S. at 61. The issue whether the Rules violate the shipping laws is to be held in reserve and only reached after the question of exemption has been resolved. *Cf.*, *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 693 (1965).

[15] Although the court of appeals concluded that the subsequently enacted statutory labor exemption in the MLAA (App. E at 123a-126a) "has no bearing on the FMC's jurisdiction over the Rules on Containers" in this case (App. A at 26a), it did, however, address this statutory exemption (App. A at 22a-26a). Its ultimate denial of the nonstatutory exemption seems to have been influenced by its interpretation of the MLAA. Accordingly, the labor exemption, which petitioners urge this Court to review, requires consideration of both statutory and nonstatutory factors.

(App. A at 37a).[16] The court of appeals purported to employ the test fashioned by this Court in *PMA* (labor exemption from shipping laws) and in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (labor exemption from antitrust laws). However, the court of appeals converted the *PMA-Pennington* intentional "imposition" test into a pure "effects" test. In the view of the court of appeals, any effect on persons outside of the bargaining unit automatically amounts to an "imposition of terms" fatal to the exemption. Since every work preservation agreement must necessarily have effects upon third parties, the decision of the court of appeals obliterates the doctrine of labor exemption for work preservation agreements.

Reasons for Granting the Writ

1. *Substantial Questions of National Scope and Importance*

This Court has already recognized that the questions of federal law in this case "present difficult and complex problems." *ILA*, 447 U.S. at 512. The court of appeals shared these sentiments. It is readily apparent from the breadth of its opinion that the court of appeals considered the intertwined federal labor, antitrust and shipping questions substantial and significant.

The decision in this case has nationwide ramifications. It has an immediate practical effect upon the labor relations of the vital longshore industry.[17] Its legal implica-

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[16] The majority of the court of appeals opined, contrary to the Commission's suggestion, that *PMA* does not limit the labor exemption to § 15 preimplementation approval (App. A at 35a-36a n.126). Circuit Judge MacKinnon (dissenting in part) disagreed (App. A at 40a-46a). Nonetheless, the majority declined to decide this question (App. A at 36a n.126).

[17] The ILA has voiced its indignation at the FMC's intrusion into its collective bargaining rights. It stands poised to reopen

(footnote continued on following page)

ions, however, extend to every labor contract in the shipping industry throughout the United States. The national labor law rights of every maritime worker are at peril.

If the decision of the court of appeals in this case is allowed to stand, the doctrines of labor exemption and work preservation are virtually annulled. *See* Handler and Zifchak, *Collective Bargaining And The Antitrust Laws: The Emasculation Of The Labor Exemption*, 81 Col. L. Rev. 459 (1981). The effects test fashioned by the court of appeals is not limited to the labor exemption from the shipping laws. It necessarily extends to the labor/antitrust exemption and the work preservation doctrine as well. The resolution of the questions presented in this case, therefore, will affect business and labor in every sector of the national economy.

2. *Conflict With Decisions of Other Circuits*

The District of Columbia Circuit's resolution of the issue whether the collectively bargained Rules are entitled to the protection of the labor exemption irreconcilably conflicts with the earlier decisions of the Second Circuit in *ICTC, supra* note 7, and the Third Circuit in *Consolidated Express, Inc.* v. *New York Shipping Association ("Conex")*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 901 (1980).

The Second Circuit in *ICTC* held that essentially the same labor provisions at issue here were entitled to the labor exemption from the antitrust laws. The Third Circuit in *Conex* rejected the notion embraced by the court

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(footnote continued from preceding page)

the national master contract which was quickly and peacefully negotiated following this Court's *ILA* decision. The labor strife which beset the industry for more than two decades is bound to resume. *See* Solicitor General's Pet. for Cert. at 17, *ILA*.

of appeals in this case that the effect upon third persons of the same labor provisions at issue here is a determinative consideration that removes the protection of the labor exemption. *Conex*, 602 F.2d at 515.

The District of Columbia Circuit refused to acknowledge the conflict. It facilely invoked this Court's observation that the labor/shipping exemption "is not always exactly congruent" with its labor/antitrust counterpart. *PMA*, 435 U.S. at 63. The court of appeals, however, failed to realize that its denial of the labor exemption rested upon a factor common to both exemptions—the deliberate "imposition of terms" test. *Compare PMA*, 435 U.S. at 62 (shipping) *with Pennington*, 381 U.S. at 665-61 (antitrust). The District of Columbia Circuit's transformation of the *PMA/Pennington* standard into an "effects" test thus pervades the entire labor exemption doctrine; it is not restricted to the shipping law exemption. The conflict with *ICTC* and *Conex* is real and perduring.

3. *Recurring Uncertainty Concerning the Labor Exemption*

The court of appeals decision in this case is important not only because it gives rise to an intercircuit conflict, but also because the issue on which the circuits disagree is a significant one which this Court has never addressed. Neither *Volkswagen* nor *PMA* defined the appropriate contours of the labor/shipping exemption for collective bargaining agreements, although Justice Harlan, concurring in *Volkswagen*, 390 U.S. at 282-91, Justice Douglas, dissenting in *Volkswagen*, *id.* at 295-316, and Justice White, writing for the majority in *PMA*, 435 U.S. at 140-64, discussed it at length. It is suggested by the court of appeals that *PMA* and *Pennington* adopted an effects standard. At no time, however, has this Court ever included

in the labor exemption equation in either the labor/shipping or labor/antitrust contexts any factor which would automatically remove the exemption because of the effects of the labor contract upon third parties.

This perversion of the *PMA/Pennington* test has far-reaching implications since it subverts the fundamental principle of the work preservation doctrine that the inherent effect of a work preservation agreement upon third parties, "no matter how severe, is of course irrelevant to the validity of the agreement." *ILA*, 447 U.S. at 507 n.22; *accord, National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 627 (1968). This undermining of established labor law principles is not obviated by labelling it "a separate issue under the labor laws,"—an expedient adopted by the court of appeals in this case (App. A at 38a n.136). The court of appeals may not so cavalierly abdicate its judicial responsibility to reconcile national labor law "with the sometimes competing policies of federal laws promoting and regulating competition, viz., the antitrust laws and in the case of maritime labor relations, the Shipping Act." *Volkswagen*, 390 U.S. at 284 (Harlan, J. concurring); *see also Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797, 806 (1945).

If the effects tests fashioned by the court of appeals in this case were to prevail, it would have a devastating impact upon collective bargaining. Disputes over job security would be insoluble. Work preservation provisions, valid under federal labor law, would nonetheless be subject to governmental invalidation under shipping and antitrust regulatory schemes having different objectives and policies. These contractual accords would no longer be viable alternatives at the bargaining table because of the reluctance of negotiators to reach an agreement that might expose them not only to the sanctions of the shipping laws

but to treble damage liability under the antitrust laws.[18] The national labor policy of encouraging the peaceful resolution of labor disputes through collective bargaining would be thwarted by this unduly onerous regime of multiple federal regulation.

This case provides an opportunity for this Court to (1) review issues it has not yet addressed, (2) reconcile the conflicting interpretations by the lower courts of its prior decisions in *Pennington*, *PMA*, *ILA* and *National Woodwork*, and (3) accommodate the overlapping labor, antitrust and shipping policies by formulating an appropriate and concrete labor exemption test.

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[18] Union unwillingness to surrender its work preservation agreements, on the other hand, will subject employers to the effects of economic strike pressure which would not be enjoinable because of the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (1976). *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 637 n.19 (1975); *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 339 n.15 (1960).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

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